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Governor

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Secretary



**State of Wisconsin**

**Department of Health and Family Services**

**OFFICE OF LEGAL COUNSEL**

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February 11, 1999

The Honorable Fred Risser, President  
Wisconsin State Senate  
1 East Main, Suite 402  
Madison, WI 53702

The Honorable Scott Jensen, Speaker  
Wisconsin State Assembly  
1 East Main, Suite 402  
Madison, WI 53702

Re: Clearinghouse Rule 98-127  
HSS 98.01, 98.03, 98.04 and 98.28 to 98.32, relating to lie detector testing of sex offenders who are in community placements.


Gentlemen:

In accordance with the provisions of s. 227.19(2), Stats., you are hereby notified that the above-mentioned rules are in final draft form. This notice and the report required by s. 227.19(3), Stats., are submitted herewith in triplicate.

The rules were submitted to the Legislative Council for review under s. 227.15, Stats. A copy of the Council's report is also enclosed.

If you have any questions about these rules, please contact Linda Harris at 267-7909.

Sincerely,

  
Paul E. Menge  
Administrative Rules Manager

cc: Gary Poulson, Assistant Revisor of Statutes  
✓ Senator Judy Robson, JCRAR  
Representative Glenn Grothman, JCRAR  
Linda Harris, Division of Care and Treatment Facilities  
Kevin Lewis, Secretary's Office

PROPOSED ADMINISTRATIVE RULES – HSS 98  
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES  
PURSUANT TO S. 227.19 (3), STATS.

Need for Rules

Section 51.375 (3), Stats., directs the Department of Health and Family Services to establish a lie detector testing program for sex offenders who are in community placements. Lie detector testing of clients who are sex offenders and are on conditional or supervised release is recognized as an effective supervision tool for determining the nature and extent of deviant sexual behavior and developing appropriate intervention strategies. In addition, it is anticipated that testing will improve treatment outcomes by overcoming client denial and by detecting behaviors that lead to re-offending.

This order does all of the following:

1. Creates a definition for lie detector examination process.
2. Adopts the statutory definitions for lie detector, polygraph and sex offender.
3. Establishes the authority, purpose and applicability of the lie detector examination process.
4. Requires a client who is a sex offender to submit to a lie detector test if required by the Department.
5. Establishes criteria for the selection of clients who are required to participate in the lie detector examination process.
6. Requires that the Department provide notice to the client who is required to participate in the lie detector examination process of the lie detector program requirements, instructions to complete any necessary questionnaires and of the date, time and location of the scheduled test.
7. Provides that an agent and an examiner will determine the questions the client may be asked during the lie detector examination process.
8. Allows an agent to consult with a treatment provider regarding the questions the client may be asked during the lie detector examination process.

9. Provides that the Department may administer the lie detector tests or contract with an outside vendor or the Department of Corrections to administer the tests.

10. Provides for sanctions if a sex offender refuses to participate in the lie detector examination process.

11. Provides that a client's conditional release or supervised release may not be revoked based solely on a finding of deception as disclosed by a lie detector test.

12. Identifies the circumstances under which the Department may disclose information regarding the lie detector tests or the information derived from the lie detector examination process.

13. Provides that the Department may not use the lie detector examination process as a method of punishment or sanction.

14. Provides that a client shall pay the costs of the lie detector test and a \$5.00 administrative fee with each payment. The cost of the lie detector test may vary, depending on the type of test used.

15. Establishes procedures for the collection of lie detector fees.

16. Provides for sanctions for a client's failure to pay the lie detector fees.

17. Provides criteria for lie detector fee deferrals.

18. Provides for the reporting and notice to the client when payment of lie detector fees is not received.

The order inserts the rules for the lie detector testing program in ch. HFS 98, the Department's rules for field supervision of persons committed to the Department for treatment.

#### Responses to Clearinghouse Recommendations

All comments of the Legislative Council's Rules Clearinghouse on the proposed rules were accepted, except the following:

2.a. Comment: The definitions of "lie detector" and "polygraph" in HSS 98.03 parallel the definitions of those terms in s. 111.37 (1) (b) and (c), Stats. Consideration should be given to cross-referencing the statutory definitions. This approach would be consistent with the treatment of the definition of "sexually violent person" in HSS 98.03 (23g), which cross-references the statutory definition.

Response: No change. The Department wants to make the new rules as self-contained as possible so that the reader does not have to consult another document. The Department of Corrections includes the two definitions in its similar rules. The definition of “sexually violent person” was already in the chapter and is not pertinent to the new rules.

2.b. Comment: In HSS 98.28, the phrase “The rules apply” should be replaced by “This chapter applies”.

Response: A change has been made, but to “This subchapter applies”.

5.b.(1) Comment: In HSS 98.31 (1) (a) (intro.), what does it mean to be “approaching release from confinement”? Can this be made more specific?

Response: By “confinement” is meant that the individual is currently in a mental health facility or a secure mental health facility, and by “approaching” is meant that the court has ordered that the individual be placed on supervised or conditional release. The phrase, “approaching release from confinement” is adequate to express this.

5.b.(3) Comment: Can “recent,” as used in HSS 98.32 (1) (b) 2. and (3) (b) 3., be clarified?

Response: No change. These rules will be administered by the Department of Corrections under a contract with DHFS and must, for this reason, be like the Corrections’ rules. In the Corrections’ rules “recent” in reference to rules violations is unmodified.

### Public Hearing

The Department held one public hearing on the proposed rules, in Madison on October 15, 1998. No one testified at the hearing. No one submitted written comments to the Department during the public review period that ended on October 22, 1998.

### Final Regulatory Flexibility Analysis

These rules apply to the Department and to persons who are sex offenders, that is, who meet any of the criteria under s. 301.45 (1), Stats., and are committed to the Department for treatment, and who are in or are scheduled to be in community placements under supervision of agents of the Department. The rules do not apply directly to small businesses as “small business” is defined in s. 227.114 (1) (a), Stats.

PROPOSED ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
RENUMBERING, AMENDING AND CREATING RULES

To renumber HSS 98.03 (23g) to (27) ; to amend HSS 98.01 (intro.) and 98.04 (3) (L); and to create HSS 98.03 (16m), (16r), (17m) and (24), 98.04 (3) (m) and (n), subch. V (title) and 98.28 to 98.32, relating to lie detector testing of sex offenders who are in community placements.

Analysis Prepared by the Department of Health and Family Services

Section 51.375 (3), Stats., directs the Department of Health and Family Services to establish a lie detector testing program for sex offenders who are in community placements. Lie detector testing of clients who are sex offenders and are on conditional or supervised release is recognized as an effective supervision tool for determining the nature and extent of deviant sexual behavior and developing appropriate intervention strategies. In addition, it is anticipated that testing will improve treatment outcomes by overcoming client denial and by detecting behaviors that lead to re-offending.

This order does all of the following:

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4. Requires a client who is a sex offender to submit to a lie detector test if required by the Department.
5. Establishes criteria for the selection of clients who are required to participate in the lie detector examination process.
6. Requires that the Department provide notice to the client who is required to participate in the lie detector examination process of the lie detector program requirements, instructions to complete any necessary questionnaires and of the date, time and location of the scheduled test.
7. Provides that an agent and an examiner will determine the questions the client may be asked during the lie detector examination process.
8. Allows an agent to consult with a treatment provider regarding the questions the client may be asked during the lie detector examination process.

9. Provides that the Department may administer the lie detector tests or contract with an outside vendor or the Department of Corrections to administer the tests.
10. Provides for sanctions if a sex offender refuses to participate in the lie detector examination process.
11. Provides that a client's conditional release or supervised release may not be revoked based solely on a finding of deception as disclosed by a lie detector test.
12. Identifies the circumstances under which the Department may disclose information regarding the lie detector tests or the information derived from the lie detector examination process.
13. Provides that the Department may not use the lie detector examination process as a method of punishment or sanction.
14. Provides that a client shall pay the costs of the lie detector test and a \$5.00 administrative fee with each payment. The cost of the lie detector test may vary, depending on the type of test used.
15. Establishes procedures for the collection of lie detector fees.
16. Provides for sanctions for a client's failure to pay the lie detector fees.
17. Provides criteria for lie detector fee deferrals.
18. Provides for the reporting and notice to the client when payment of lie detector fees is not received.

The order inserts the rules for the lie detector testing program in ch. HFS 98, the Department's rules for field supervision of persons committed to the Department for treatment.

The Department's authority to renumber, amend and create these rules is found in ss. 51.37 (9), 51.375 (3), 971.17 (3) (e), 980.06 (2) (d) and 980.08 (6), Stats. The rules interpret ss. 51.37 (9), 51.375, 971.17 (3) to (6), 980.06 (2) (c) and (d) and 980.08 (5) and (6), Stats.

SECTION 1. HSS 98.01 (intro.) is amended to read:

HSS 98.01 AUTHORITY AND PURPOSE. This chapter is promulgated under the authority of ss. 51.37 (9), 51.375 (3), 971.17 (3) (e), 980.06 (2) (d) and 980.08 (6), Stats., to provide rules for supervision in communities of persons who are committed to

the department and placed under its control after being found not guilty by reason of mental illness or defect of having committed a crime or after being found to be sexually violent persons or who are otherwise sex offenders. Supervision is intended to provide for the public's safety, promote social reintegration, reduce repetition of crime and carry out the statutory directives under s. 46.03 (1) and (5), Stats. The following goals and objectives are relevant for fulfillment of these purposes:

SECTION 2. HSS 98.03 (16m), (16r) and (17m) are created to read:

HSS 98.03 (16m) "Lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or other similar device, whether mechanical or electrical, that is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual.

(16r) "Lie detector examination process" means the entire process of lie detector testing, including completion of any preliminary questionnaires, pretest questions, baseline questions and the actual lie detector testing, and post-testing interrogation.

(17m) "Polygraph" means an instrument that fulfills all of the following requirements:

(a) Records continuously, visually, permanently and simultaneously any changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards.

(b) Is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual.

SECTION 3. HSS 98.03 (23g) to (27) are renumbered 98.03 (25) to (30).

SECTION 4. HSS 98.03 (24) is created to read:

HSS 98.03 (24) "Sex offender" means a person committed to the department who meets any of the criteria specified in s. 301.45 (1), Stats.

SECTION 5. HSS 98.04 (3) (L) is amended to read:

HSS 98.04 (3) (L) ~~A client~~ If committed under s. 971.17 or 980.06, Stats., may have his or her conditional or supervised release revoked only by the releasing court.

SECTION 6. HSS 98.04 (3) (m) and (n) are created to read:

HSS 98.04 (3) (m) Submit to the lie detector examination process under s. HSS 98.31 as directed by the department.

(n) Pay fees for the lie detector examination process under ss. HSS 98.31 (5) and 98.32 and comply with any required department procedures regarding payment of fees.

SECTION 7. Subchapter V (title) of ch. HSS 98 and HSS 98.28 to 98.32 are created to read:

SUBCHAPTER V -  
LIE DETECTOR TESTING

HSS 98.28 PURPOSE, AUTHORITY AND APPLICABILITY. This subchapter is promulgated under the authority of s. 51.375 (3), Stats., to establish a lie detector program for clients who are sex offenders. This subchapter applies to the department and to clients who are sex offenders.

HSS 98.29 LIE DETECTOR REQUIREMENT. The department may require a client who is a sex offender to submit to the lie detector examination process in accordance with s. HSS 98.31 as a condition of supervision.

HSS 98.30 PURPOSE OF LIE DETECTOR PROGRAM. (1) The department may use the lie detector examination process as a supervision tool for clients who are sex offenders. Testing may be used to achieve any of the following goals in supervising a client who is a sex offender:

- (a) Disclosing offense pattern information for treatment purposes.
- (b) Holding the client accountable for behaviors which occur while on supervision.
- (c) Verifying the accuracy of self-reporting.
- (d) Assisting in the monitoring and early identification of rule violations and other criminal behavior.
- (e) Providing a deterrent to re-offending.
- (f) Identifying the clients who need more intensive supervision or treatment.
- (g) Providing more information for purposes of assessment, treatment and monitoring.

(2) The department may not use the lie detector examination process as a punishment or sanction.



HSS 98.31 OPERATION OF LIE DETECTOR PROGRAM. (1) **SELECTION OF PARTICIPANTS.** Upon the approval of an agent's supervisor, an agent may require a client who is a sex offender to participate in the lie detector program. The agent may require a client who is a sex offender to submit to the lie detector examination process based on the following:

(a) For a client who is a sex offender and who is approaching release from confinement:

1. The client's criminal record of sexual offenses.
2. The client's adjustment under previous supervision.
3. The client's participation in offense-related programming while incarcerated or institutionalized.
4. The client's motivation or refusal to participate in continued programming in the community.

(b) For a client who is a sex offender and who is currently under field supervision:

1. The client's criminal record of sexual offenses.
2. The client's adjustment under supervision, including recent rules violations or recent consideration for alternatives to revocation.
3. The client's compliance with current programming.

(2) **NOTICE.** (a) An agent shall provide a client who is a sex offender and who is selected to participate in the lie detector examination process written notice of the lie detector program requirements. The department may require a client who is a sex offender to participate in the lie detector examination process without the client's informed consent.

(b) An agent shall provide written notice to a client who is a sex offender and who is required to take a lie detector test. The notice shall include the following:

1. Date, time, and location of the scheduled test.
2. Instructions to complete any preliminary questionnaires.

(3) **LIE DETECTOR TEST QUESTIONS.** (a) The lie detector examiner shall determine the questions to be asked during the lie detector examination process and shall

consult with the agent in determining the questions to be asked. If the client who is a sex offender is receiving treatment, the examiner or agent may consult with the treatment provider regarding development of questions to be asked during the lie detector examination process.

(b) The agent or examiner may consider any of the following in determining the questions to be asked during the lie detector examination process:

1. The client's involvement in current offense-related programming.
2. The client's level of denial.
3. The client's recent pattern of rules violations.
4. The client's noncompliance with treatment.
5. The agent's need to verify the client's compliance with supervision, treatment or self-reporting.
6. The agent's need to document and verify the extent of the client's sexual history.

(4) TEST ADMINISTRATION. The department may administer lie detector tests or contract with an outside vendor or the department of corrections to administer the tests.

(5) ASSESSMENT OF FEES. The department shall establish a schedule of fees in accordance with s. HSS 98.32.

(6) SANCTIONS. (a) If a client who is a sex offender refuses to participate in any portion of the lie detector examination process or to pay a lie detector fee, the agent shall investigate the refusal as a violation of a rule or condition of supervision in accordance with s. HSS 98.04 (3).

(b) If a client who is a sex offender discloses a violation of a rule or condition of supervision during the lie detector examination process, the agent shall investigate the disclosure as a violation of a rule or condition of supervision, in accordance with s. HSS 98.04 (3).

(c) If a client who is a sex offender discloses criminal conduct during the lie detector examination process, the agent, with the approval of the agent's supervisor, shall refer the disclosure to law enforcement authorities.

(d) Revocation of conditional or supervised release of a client who is a sex offender may not be based solely on a finding of deception as disclosed by a lie detector test.

(7) DISCLOSURE OF TEST INFORMATION. The department may disclose information regarding a lie detector test or information disclosed during the lie detector test examination process of a client who is a sex offender only to the following and only for purposes relating to supervision programming, care and treatment of the client:

- (a) Department employees.
- (b) Department of corrections employees.
- (c) Department vendors.
- (d) Another agency or person.
- (e) Law enforcement agencies.

HSS 98.32 LIE DETECTOR FEE. The department shall establish a schedule of fees to partially offset the costs of the lie detector program for clients who are sex offenders and who are required to take a lie detector test. A client shall pay for the costs of the test in accordance with the schedule of fees. The costs of the tests may vary depending on the type of test used. A client shall also pay a \$5 administrative fee with each payment. The department shall do all of the following in establishing a fee schedule for lie detector testing and in collecting lie detector fees:

(1) BASIS OF FEE. Base the lie detector fee payment schedule upon the client's ability to pay, with the goal of receiving payment for the costs of administering the test and a \$5 administrative fee with each payment.

(2) TIMING OF PAYMENTS. Permit payment of the fee to be paid in any of the following ways:

- (a) Full payment of the fee within 30 days of the date the client takes the lie detector test.
- (b) Quarterly payment of the fee to be paid in full within one year of the date the client takes the lie detector test.
- (c) Monthly installment payments of the fee to continue until the fee is paid in full.

(3) DEFERRAL OF PAYMENTS. (a) Except if the client has the present ability to pay the fee, permit deferral of payment if the client meets one or more of the following conditions, until a time when the condition or conditions no longer exist:

1. Has used all reasonable and appropriate means to obtain employment as determined by the client's agent, but has been unable to obtain employment which provides the client sufficient income to pay the lie detector fee.

2. Is a student enrolled in a full-time course of instruction. In this subdivision, "full-time course of instruction" means enrolled in an accredited course of instruction and registered for more than 9 credits in post-secondary education or full-time high school or full-time junior high school, and "school" means a public school under s. 115.01 (1), Stats., a charter school as defined in s. 115.001 (1), Stats., or a private school as defined in s. 115.001 (3r), Stats. The client shall provide a release of information to verify enrollment and registration of credits. If the client fails to provide the release of information, no deferral may be given. The educational institution shall certify to the department that the offender is enrolled and attending a full-time course work at the educational institution.

3. Is undergoing psychological, chemical or medical treatment consistent with the supervision plan approved by the department and is unable to be employed. The treatment provider shall certify the status to the department.

4. Has a statement from a licensed physician excusing the client from work for medical reasons and the client is unable to be employed because of the medical reasons.

(b) The agent shall make a determination concerning a client's deferral of payment of the lie detector fee within 10 working days of determining that a client is required to participate in the lie detector examination process or within 10 working days of a change in the client's financial or employment status as reported in accordance with s. HSS 98.04 (3) (f).

(c) The agent's supervisor shall review all decisions made by the client's agent to defer payment of the lie detector fee.

(4) COLLECTION. Develop procedures for the collection of lie detector fees. The client who is a sex offender shall pay the lie detector fees to the department according to the procedures established by the department.

(5) COPIES OF FEE SCHEDULE AND PAYMENT PROCEDURES. Provide the client who is a sex offender with copies of the lie detector fee schedule, administrative fee requirement and lie detector fee payment procedures.

(6) **RECORD OF PAYMENTS.** Record all lie detector fees paid by the client and, on request of the client, provide the client with a copy of the record of payments to verify receipt of the payments.

(7) **NOTICE TO CLIENT WHEN PAYMENT IS NOT RECEIVED.** Advise the client in writing if payment of the lie detector fee has not been made in accordance with the payment schedule.

(8) **POSSIBLE ACTIONS IF FEE IS NOT PAID.** Take action under s. HSS 98.31(6) (a), if a client who is a sex offender fails to pay a lie detector fee. The department may use any of the following actions in any order when a client who is a sex offender fails to pay the lie detector fee:

(a) Counseling.

(b) Wage assignment.

(c) Review of supervision level to determine if more restrictive sanctions are needed, including an increase in the level of supervision, electronic monitoring or detention in a jail, correctional facility or house of correction.

(d) Issuance of a recommendation for revocation of conditional or supervised release under the provisions of s. HSS 98.16 for the client's willful failure to pay the lie detector fee after the agent has taken action under sub. (1) and has determined that the client has the ability to pay the lie detector fee.

(e) Any other appropriate means of obtaining the lie detector fee.

The rules contained in this order shall take effect the first day of the month following publication in the Wisconsin Administrative Register, as provided in s. 227.22 (2), Stats.

Wisconsin Department of Health and  
Family Services

Dated:

By: \_\_\_\_\_  
Joseph Leean  
Secretary

SEAL: